

A SELVANATHAN THIRUVENGADAM & ANOR v.
JOHN VARISTUS TOTU & ANOR

COURT OF APPEAL, PUTRAJAYA

ROHANA YUSUF JCA

VERNON ONG LAM KIAT JCA

B HARMINDAR SINGH DHALIWAL JCA

[CIVIL APPEAL NO: B-02(NCVC)(W)-1125-06-2017]

28 MAY 2018

C *LAND LAW: Sale and purchase of property – Transfer – Restriction in interest – Consent to transfer from State Authority – Whether merely a limitation or prohibition – Whether consent obtained – Whether failure to obtain consent rendered transaction unlawful – Whether vendor acted in bad faith in thwarting consent order by misrepresentation of facts*

D *LAND LAW: Sale and purchase of property – Termination – Restriction in interest – Consent to transfer from State Authority – Whether obtained – Whether failure to obtain consent rendered transaction unlawful – Whether termination lawful – Whether purchasers ready and willing to continue with agreement – Whether purchasers entitled to order of specific performance*

E The plaintiffs, the purchaser of a unit at Pangsapuri Vista Millennium ('the property'), entered into a sale and purchase agreement ('SPA') with the defendants for the sub-sale of the property on 7 December 2009. The property had a restriction in interest, in that, consent to transfer had to be obtained from the State Authority ('SA') and the developer was to undertake steps to secure blanket approval for transfer of all the units to the purchasers of the project. At that stage, it appeared that the property was a bumiputera unit. The solicitors of the bank, from which the plaintiffs obtained a loan, raised the issue of the property being a bumiputera unit. The plaintiff thus requested to the developer to apply for the consent of the SA. There was no response from the developer resulting in an impasse between the parties which carried on between 2011 and 2012. Meanwhile, the defendants, in anticipation of the sale, moved in to occupy the property and they were unwilling to pay the balance of the purchase as there was a risk that the property could not be transferred to them. In 2012, an effort was made to resolve the matter ('the purported 12 October 2012 settlement'). By a letter dated 9 October 2012, the plaintiffs expressed their intention to terminate the SPA and subsequently filed an action seeking a declaration that the notice of termination dated 9 December 2012 was valid and enforceable and for a declaration that the SPA dated 7 December 2009 had been validly terminated. The defendants, in turn, filed a counterclaim seeking specific performance of the SPA. The Judicial Commissioner ('JC') found that the purported 12 October 2012 settlement was not binding on the parties and

hence, was of no consequence to the instant appeal. On the issue whether the SPA was binding on the parties, the JC found that there was a mutual mistake of fact essential to the contract and declared the SPA as null and void and therefore not binding on the parties. Hence, the appeal by the defendants. The defendants argued that the restriction in interest was merely a limitation subject to the approval of the SA and not a prohibition so as to render the transaction unlawful. It was asserted that the consent of SA was obtained on 4 September 2015 which was later frozen when the Land Administrator ('LA') was misled into doing so when told that there was a pending suit when in reality there was none at that time. On the other hand, the plaintiffs maintained that the failure of the defendants to pay the balance purchase price before the extended completion date amounted to a fundamental breach of the SPA which entitled the plaintiffs to terminate the SPA. The plaintiffs claimed that the notice of termination was valid and effective in law on the ground that the SPA could not be concluded as the property was a bumiputera lot.

Held (allowing appeal with costs; setting aside order of High Court)

Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

- (1) The issue of mutual mistake was never pleaded nor raised by any party in the proceedings. Therefore, the JC was plainly wrong in making a finding of mutual mistake. (paras 13 & 31)
- (2) The parties had mutually agreed to be bound by the terms contained in the letter dated 6 February 2015, written by the solicitors for the plaintiffs to the defendants' solicitors. It was common ground that the individual strata title had been issued on 12 June 2013 and the property was duly registered in the names of the plaintiffs with the restriction that the title could not be transferred, leased or charged without the consent in writing of the SA. By a letter dated 4 September 2015, the plaintiffs were informed that the consent to transfer was approved. By another letter, dated the same, addressed to the defendants, the Pejabat Daerah dan Tanah Petaling approved the charging of the property by any lawful financial institution. (paras 20-23)
- (3) Pursuant to a letter by the first plaintiff seeking rescission of the consent, the LA issued a letter freezing the order of consent of the SA. The order of consent was to be effective once the court decided on the dispute between the parties. However, there was no action pending as the originating summons referred to had been disposed of by the High Court. Hence, there had been misrepresentation of the facts in the enquiry before the LA. (paras 24, 26-28)

- A (4) The obligations of the parties under the SPA was superseded by the
letter of 6 February 2015. As the title to the property contained the
restriction in interest, in that, transfer of title could only be effected with
the consent of the SA, it was incumbent upon the parties to obtain the
consent. Having agreed to apply for the consent and having obtained the
B approval dated 4 September 2015, it was not open to the plaintiffs to
then renege on the agreement much less take active steps to thwart the
consent order by a misrepresentation of the facts. The plaintiffs had
acted unconscionably and in bad faith. Further, the plaintiffs' motivation
in resorting to such unconscionable conduct was due to the
C fact that the market value of the property had gone up. The parties,
including the plaintiffs, were bound by what they have agreed in the
letter dated 6 February 2015. The JC, having failed to address her mind
on this agreement and the subsequent approval by the SA, had therefore
misdirected herself in law and fact. (paras 30 & 32)
- D (5) As there could not have been any lawful termination of the SPA, an
order for specific performance of the SPA ought to be granted. A decree
of specific performance will lie against a vendor who refuses to honour
an agreement after a condition, such as consent of the authority, has been
fulfilled or even where there is a refusal to apply for such consent. As
the defendants were ready and willing to continue with the agreement
E and were able to pay the balance of the purchase price and that the SA
had given its consent to the transfer, it was only appropriate and fair that
an order for specific performance be allowed. (paras 35 & 36)

Bahasa Malaysia Headnotes

- F Plaintiff-plaintiff, pembeli sebuah unit Pangsapuri Vista Millennium
(‘hartanah’), memasuki satu perjanjian jual beli (‘PJB’) dengan defendan-
defendan untuk menjual semula hartanah tersebut pada 7 Disember 2009.
Hartanah itu mempunyai sekatan kepentingan, di mana, persetujuan untuk
memindah milik perlu diperoleh daripada Pihak Berkuasa Negeri (‘SA’) dan
G pemaju sepatutnya mengambil langkah-langkah untuk memperoleh kelulusan
menyeluruh pindah milik kesemua unit untuk pembeli-pembeli di projek itu.
Di peringkat itu, jelas bahawa hartanah tersebut adalah unit bumiputera.
Peguam cara bank, yang mana plaintiff memperoleh pinjaman, membangkitkan
isu bahawa hartanah tersebut adalah unit bumiputera. Oleh itu, plaintiff
H meminta pemaju memohon persetujuan SA. Tiada balasan daripada pemaju,
menjurus pada jalan buntu antara pihak-pihak yang berterusan antara 2011
dan 2012. Sementara itu, defendan-defendan, dengan harapan terhadap jualan
tersebut, berpindah untuk menduduki hartanah tersebut dan enggan
membayar baki harga belian kerana terdapat risiko yang hartanah itu tidak
I boleh dipindah milik kepada mereka. Dalam 2012, usaha dilakukan untuk

menyelesaikan perkara tersebut ('cubaan penyelesaian 12 Oktober 2012'). Melalui surat bertarikh 9 Oktober 2012, plaintif-plaintif menyatakan hasrat mereka untuk menamatkan PJB dan kemudiannya memfailkan tindakan memohon deklarasi bahawa notis penamatan bertarikh 9 Disember 2012 sah dan berkuat kuasa dan untuk deklarasi bahawa PJB bertarikh 7 Disember 2009 ditamatkan secara sah. Sebaliknya, defendan-defendan memfailkan tuntutan balas memohon pelaksanaan spesifik PJB. Pesuruhjaya Kehakiman ('PK') mendapati bahawa cubaan penyelesaian 12 Oktober 2012 tidak mengikat pihak-pihak dan oleh itu, tidak terpakai untuk rayuan ini. Atas isu sama ada PJB mengikat pihak-pihak, PK mendapati terdapat kesilapan bersama fakta penting kontrak dan mengisytiharkan PJB batal dan tidak sah dan oleh itu, tidak mengikat pihak-pihak. Dengan itu, rayuan ini oleh defendan-defendan. Defendan-defendan menghujahkan bahawa sekatan kepentingan hanya penghadan yang tertakluk kepada persetujuan SA dan bukan larangan sehingga mengakibatkan transaksi tersebut tidak sah. Dinyatakan juga bahawa persetujuan SA telah diperoleh pada 4 September 2015 tetapi kemudiannya dibekukan apabila Pentadbir Tanah ('PT') diperdaya untuk berbuat demikian apabila dimaklumkan bahawa terdapat guaman yang belum selesai, tetapi sebenarnya tiada pada ketika itu. Plaintif-plaintif sebaliknya mengekalkan hujahan bahawa kegagalan defendan-defendan membayar baki harga belian sebelum lanjutan tarikh penyelesaian membentuk pelanggaran asas PJB yang memberi hak kepada plaintif-plaintif menamatkan PJB. Plaintif-plaintif menyatakan bahawa notis penamatan sah dan berkesan di sisi undang-undang atas alasan bahawa PJB tidak boleh diselesaikan kerana hartanah tersebut adalah lot bumiputera.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)

Oleh Harmindar Singh HMR menyampaikan penghakiman mahkamah:

- (1) Isu kesilapan bersama tidak pernah dihidkan atau dibangkitkan oleh mana-mana pihak dalam prosiding. Oleh itu, PK jelas khilaf apabila membuat dapatan kesilapan bersama.
- (2) Pihak-pihak bersetuju bersama untuk terikat oleh terma-terma yang terkandung dalam surat bertarikh 6 Februari 2015, oleh peguam cara plaintif-plaintif kepada peguam cara defendan-defendan. Adalah alasan bersama bahawa hak milik strata individu telah dikeluarkan pada 12 Jun 2013 dan hartanah tersebut didaftarkan atas nama plaintif-plaintif dengan sekatan bahawa hak milik tersebut tidak boleh dipindah milik, dipajak atau digadai tanpa persetujuan bertulis SA. Melalui surat bertarikh 4 September 2015 plaintif-plaintif dimaklumkan bahawa persetujuan untuk memindah milik telah diluluskan. Melalui surat yang satu lagi, dengan tarikh yang sama, dialamatkan kepada defendan-defendan, Pejabat Daerah dan Tanah Petaling meluluskan gadaian hartanah tersebut oleh mana-mana institusi kewangan yang sah.

- A (3) Walau bagaimanapun, berikutan surat oleh plaintif pertama memohon pembatalan persetujuan, PT mengeluarkan surat pembekuan perintah persetujuan SA. Perintah persetujuan tersebut akan berkuat kuasa apabila mahkamah memutuskan pertikaian antara pihak-pihak. Walau bagaimanapun, tiada tindakan mahkamah yang menunggu penyelesaian
- B kerana saman pemula yang dirujuk telah pun diputuskan oleh Mahkamah Tinggi. Oleh itu, terdapat salah nyata fakta dalam siasatan di hadapan PT.
- C (4) Kewajipan pihak-pihak bawah PJB digantikan oleh surat bertarikh 6 Februari 2015. Oleh sebab hak milik hartanah mengandungi sekatan kepentingan, di mana, pindah milik hanya boleh dibuat dengan persetujuan SA, penting untuk pihak-pihak memperoleh persetujuan tersebut. Setelah menyetujui untuk memohon persetujuan dan setelah memperoleh persetujuan bertarikh 4 September 2015, plaintif-plaintif tidak boleh memungkirkan perjanjian tersebut apatah lagi mengambil langkah-langkah untuk menghalang perintah persetujuan dengan salah
- D nyataan fakta. Plaintif-plaintif bertindak secara tidak berpatutan dan dengan niat jahat. Selanjutnya, motivasi plaintif-plaintif untuk mengambil tindakan yang tidak berpatutan itu adalah disebabkan fakta bahawa nilai pasaran hartanah telah meningkat. Pihak-pihak, termasuk plaintif-plaintif, terikat dengan apa yang dipersetujui dalam surat bertarikh 6 Februari 2015. Pesuruhjaya Kehakiman, setelah gagal mempertimbangkan perjanjian ini dan kelulusan SA yang diberi kemudiannya, oleh itu tersalah arah dari segi undang-undang dan fakta.
- E (5) Oleh sebab tiada penamatan PJB yang sah, perintah pelaksanaan spesifik PJB wajar diberikan. Dekri pelaksanaan spesifik adalah untuk penjual yang enggan melaksanakan perjanjian selepas syarat, seperti persetujuan pihak berkuasa, telah dipenuhi atau jika terdapat keengganan memohon persetujuan tersebut. Oleh sebab defendan-defendan bersedia dan mahu meneruskan dengan perjanjian dan mampu membayar baki harga belian dan SA telah pun memberikan persetujuan untuk pindah milik, adalah
- F wajar dan adil perintah pelaksanaan spesifik dibenarkan.
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Case(s) referred to:

Chin Tai v. Siow Shiow & Ors [1970] 1 LNS 15 FC (*refd*)

Chong Hoong & Anor v. Wong Yuen Sang [1975] 1 LNS 13 HC (*refd*)

Halimah Abdul Rahman v. Fatimah Abdullah [1976] 1 LNS 38 FC (*refd*)

H *Lim Siew Leong & Anor v. Vallipuram* [1973] 1 LNS 80 FC (*refd*)

Yeo Liong Ho v. Loh Choon Hooi [2010] 2 CLJ 580 CA (*refd*)

Legislation referred to:

National Land Code, ss. 27, 261

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For the appellants - Joseph Iruthayam; M/s Joseph Iruthayam & Co

For the respondents - Gerard Samuel & AC Devi; M/s Gerard Samuel & Assocs

[Editor's note: For the High Court judgment, please see John Varistus Totu @ John Francis Totu & Anor v. Selvanathan Thiruvengadam & Anor [2017] 1 LNS 1313 (overruled).]

Reported by S Barathi

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JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal emanates from the decision of the High Court at Shah Alam delivered on 27 April 2017 after a full trial. The dispute concerned rights over a property after a sale and purchase agreement had been entered into by the parties to the dispute.

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[2] The High Court had allowed the respondents' claim and essentially granted all the declarations sought in relation to the property known as Unit No. 03A-16, Blok Delima, Pangsapuri Vista Millennium, Jalan DM1, Taman Desa Millennium, 47510 Puchong, Selangor ("the property") including declaring that the sale and purchase entered into between the appellants and the respondents had been validly terminated. The counterclaim for specific performance of the said agreement was dismissed by the High Court.

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[3] Aggrieved with this decision, the appellants have now appealed to this court. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the orders of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court. For convenience, the parties will be referred to as they were in the High Court.

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Salient Facts

[4] The salient facts giving rise to the civil suit can be stated as follows. The plaintiffs are husband and wife. They are retired civil servants of Kadazan ethnicity. The defendants were also husband and wife. The plaintiffs had originally purchased the said property from the developer, Millennium Land Development Sdn Bhd ("the developer"), for the sum of RM176,514 on 1 October 2003. At the time, strata title in respect of the said property had yet to be issued. However, the block master title had a restriction in interest in that consent to transfer had to be obtained from the State Authority.

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[5] Nevertheless, the developer was to undertake steps to secure blanket approval for the transfer of all the units to the purchasers of the project. Before this was done, the plaintiffs made a sub-sale of the property to the defendants. A sale and purchase agreement dated 7 December 2009 ("the

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A SPA”) for the consideration sum of RM110,000 was signed. A sum of RM11,000 was paid as deposit pursuant to this SPA. It appeared at that stage that the said property was a Bumiputera unit in that only a Bumiputera was allowed to purchase the unit.

B [6] Meanwhile, the plaintiffs managed to obtain a loan of RM79,378 from CIMB Bank (“the bank”). The difference between the loan amount and the purchase price was paid over to the plaintiffs’ solicitors. Shortly after, the issue of the property being a Bumiputera unit was raised by the bank’s solicitors. There was a request by the plaintiffs to the developer to apply for the consent of the State Authority but this was met with no response by the developer. This resulted in an impasse between the parties which carried on between 2011 and 2012.

C [7] Meanwhile, in anticipation of the sale, the defendants had moved in to occupy the property presumably with the consent of the plaintiffs. As noted by the learned Judicial Commissioner (“JC”), the defendants were understandably unwilling to pay the balance of the purchase as there was a risk that the property could not be transferred to them. Then in 2012, an effort was made to resolve the matter through what the learned JC termed “the purported 12 October 2012 settlement”.

D [8] By a letter dated 9 October 2012, the plaintiffs through their solicitors wrote to the defendants’ solicitors stating that the parties were misled by the estate agent and the agreement cannot be concluded as the property was a Bumiputera allocation. They expressed their intention to terminate the SPA and asked the defendants’ solicitors as to whether they were agreeable to the terms as contained in the letter (at p. 458 of RR Bhg C). After some exchange of letters, no agreement was reached.

E [9] The plaintiffs later filed this action seeking essentially a declaration that the notice of termination dated 9 December 2012 was valid and enforceable. They also sought for a declaration that the SPA dated 7 December 2009 between the plaintiffs and the defendants had been validly terminated. The defendants in turn filed a counterclaim seeking specific performance of the said SPA.

Findings Of The High Court

G [10] Although the parties had come up with their own issues for determination at the trial, the learned JC considered that there were only two issues for the determination of the court. The first issue was whether the SPA of 7 December 2009 was binding on the parties. The second issue was whether the parties were bound by the purported 12 October 2012 settlement.

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[11] On the second issue, as there was no concluded agreement by the parties, the learned JC found quite rightly in our view that the purported settlement was not binding on the parties. In any event, this purported settlement was of no consequence to the instant appeal.

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[12] The other issue which the learned JC had to contend with at the trial was whether the SPA of 7 December 2009 was binding on the parties. In this regard, the learned JC found that there was a mutual mistake of fact essential to the contract and declared the SPA as null and void and therefore not binding on the parties. This was how the learned JC put it:

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19. However, the parties' mistake must be in respect of a fact essential to the agreement. In the instant case, the facts adduced during trial showed that at the time when the parties executed the Sale and Purchase Agreement of 7th December 2009, they were unaware that the property was a Bumiputera unit. As such, without the State Authority's consent, the plaintiffs did not have the legal capacity to effect a transfer to the defendants. I find this constitutes a mutual mistake of a fact essential to the contract.

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[13] We are constrained to observe at once that the issue of mutual mistake was never pleaded nor raised by any party in the proceedings below. The case for the plaintiffs appeared to be that they had no obligation to apply for the consent from the State Authority to transfer the property to the defendants. Their case was also that due to the failure of the defendants to pay the balance of the purchase price and in any event the failure of the parties to conclude the agreement, the notice of termination dated 9 October 2012 was valid and effective.

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[14] The case for the defendants was that it was the obligation of the plaintiffs to apply and obtain consent in writing of the State Authority since the individual strata title contained that restriction in interest. It was also their case that the parties had mutually agreed by the letter dated 6 February 2015 that the plaintiffs shall apply for the consent to transfer. Since that consent was granted on 4 September 2015, the SPA should now be specifically performed as there was no longer any hindrance to the transfer.

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[15] From a perusal of the grounds of judgment, there appeared to be no finding by the learned JC on all these contentious matters raised by the parties. Nevertheless, and unfortunately in our view, the learned JC proceeded to grant the declaration that the notice of termination dated 9 October 2012 was valid which to us does not follow from the finding that the SPA was null and void due to mutual mistake.

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A **Our Decision**

[16] Before us, it was submitted by the defendants/appellants that the finding of the learned JC was erroneous as the restriction in interest was merely a limitation subject to the approval of the State Authority and not a prohibition so as to render the transaction unlawful. The judgment was also assailed as the learned JC failed to take into account the critical evidence of the letter dated 6 February 2015 which superseded earlier agreements between the parties. It was also asserted that consent by the State Authority was obtained on 4 September 2015 which consent was later frozen when the Land Administrator was misled into doing so when told there was a pending suit when in reality there was none at the time.

[17] The plaintiffs/respondents, on the other hand, maintained the arguments which they had put forward at the trial. They submitted that the failure of the defendants to pay the balance purchase price before the extended completion date of 14 October 2015 amounted to a fundamental breach of the SPA which entitled the plaintiffs to terminate the said agreement. They claimed that the notice of termination dated 9 October 2012 was valid and effective in law on the ground that the SPA could not be concluded as the property was a Bumiputera lot.

[18] In our view, the plaintiffs' stance overlooks events which transpired after the letter of 9 October 2012. As alluded to earlier, there were efforts at settlement by the parties on 12 October 2012 after the said notice of termination. This was duly noted by the learned JC. The terms of settlement were not agreed by the parties despite an exchange of correspondence.

[19] Now, the matter was never resolved by the purported letter of termination as the defendants refused to vacate the property and insisted that the SPA be performed. They continued to maintain that the plaintiffs had the obligation to obtain the consent to transfer of the State Authority. The plaintiffs could not take the moral high ground as they were in possession of monies paid by the defendants pursuant to the SPA. It was only in 2015 that matters took a different turn.

[20] To break the impasse as it would seem, by a letter dated 6 February 2015, the solicitors for the plaintiffs wrote to the defendants' solicitors. This was an undisputed document. It was found in Part A of the common bundle meaning it was an agreed document both as to its authenticity and content. The relevant parts of the letter read as follows:

We have been instructed by our client Mr. John Varistus that your client Mr. T. Selvanathan spoke to him sometime in December 2014 after our letter dated 15.12.2014 was sent to you.

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During this conversation your client again requested that our client apply for consent from the State Authority to transfer the said Property pursuant to the Sale and Purchase Agreement dated 7.12.2009 between the parties and your client promised that if the consent is rejected then your client would vacate the Property.

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As such our client has instructed us to do the following:

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- (a) Apply for Consent to transfer from the state Authority in accordance with the Sale and Purchase Agreement dated 7.12.2009;
- (b) If the consent is granted then the parties are to complete the Sale and Purchase Agreement dated 7.12.2009 in accordance with the terms and conditions therein; and
- (c) If the consent is refused then your clients are required to vacate the Property and deliver vacant possession of the same to our clients within 30 days from the date of notification of the rejection by the State Authority which shall be forwarded by us to your firm within 48 hours of the receipt of the same from the Land Office.

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Kindly be informed that our clients have appointed Messrs. Yong dan Rakan-Rakan, Advocates & Solicitors, Petaling Jaya to prepare and forward the consent application to the Land Office.

In the interim, we require the following documents from your clients for the purposes of the consent application:

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- (i) Duly completed and affirmed Application Form for Consent to Transfer (with the Statutory Declaration therein) [the Purchasers' part] and
- (ii) 2 sets each of clear photocopies of your clients' national identity cards (back and front) duly certified as true copies to you.

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Please forward the same to us at the earliest.

Thank you.

Yours faithfully,

For Messrs. Gerard Samuel & Associates

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[21] Now, it cannot also be disputed that the parties had mutually agreed to be bound by the terms contained in this letter as by letter dated 2 March 2015, the solicitors for the defendants forwarded the documents requested for in the letter of 6 February 2015. This was further supported by the subsequent conduct of the preparation of the application form for consent of both parties and the subsequent submission of the application form for the consent of the State Authority. At the time, it was common ground that the individual strata title had been issued on 12 June 2013 and the property was duly registered in the names of the plaintiffs with the restriction that the title could not be transferred, leased or charged without the consent in writing of the State Authority.

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A [22] By letter dated 4 September 2015, the Pejabat Daerah and Tanah Petaling informed the plaintiffs through Messrs Yong dan Rakan-Rakan that consent to transfer was approved. The body of the letter appeared as follows:

Permohonan tuan/puan bertarikh 13/5/2015 adalah dirujuk.

B 2. Sukacita di maklumkan bahawa permohonan tuan/puan/tetuan untuk medapatkan kebenaran pindahmilik tanah di atas kepada:

Selvanathan a/l Thiruvengadam – No. KP 661018-10-5045 ½ BHG

Santhi a/p Subramaniam – No. KP 700924-10-6196 ½ BHG

C telah **diluluskan** oleh Pihak Berkuasa Negeri.

Bahagian pindahmilik adalah **Kesemua** bahagian.

3. Sila sertakan surat kelulusan ini bersama-sama dengan borang pindahmilik.

D 4. Surat kelulusan ini sah laku dalam tempoh 3 tahun sahaja, berkuatkuasa dari tarikh dikeluarkan.

Sekian, terima kasih. (emphasis added)

E [23] By another letter also dated 4 September 2015, this time addressed to the defendants, the Pejabat Daerah dan Tanah Petaling also approved the charging of the said property by any lawful financial institution. This approval was also valid for three years. Now, this should have ended the impasse between the parties. However, subsequent events showed otherwise in that instead of working towards completing the SPA as agreed by the letter of 6 February 2015, the plaintiffs, and in particular their solicitor, in our assessment, displayed extreme bad faith in attempting to scuttle the SPA by trying to rescind the consent given by the State Authority.

F [24] Displaying utter disregard to what had been agreed in the letter of 6 February 2015, the first plaintiff sent a letter dated 15 September 2015 to the Pejabat Daerah dan Tanah Petaling seeking for the said consent to be rescinded. That body of that letter read as follows (at p. 515 RR Bhg C):

G Saya merujuk kepada perkara di atas dimana saya dan isteri adalah pihak Pemohon dan saya juga merujuk kepada permohonan yang diterima oleh pihak Tuan pada 13 Mei 2015

H Saya ingin memaklumkan kepada pihak Tuan bahawa Perjanjian Jual Beli bertarikh 7 Disember 2009 antara Pemohon dan Penerima untuk Harta tersebut telahpun ditamatkan pada 9 Oktober 2012. Sesalanan surat penamatan tersebut dilampirkan di sini untuk rujukan Tuan.

I Oleh yang demikian, saya dengan rendah diri memohon jasa baik pihak Tuan untuk membatalkan permohonan untuk kebenaran memindah-milik tersebut yang telah diluluskan pada 4 September 2015 dan dikutip

daripada Pejabat Tanah Petaling pada 9 September 2015 tetapi saya belum terima Surat Kebenaran Pindahmilik yang tersebut diatas, saya memohon agar surat tersebut ditarik-balik dan dibatalkan dengan serta-merta oleh pihak Tuan.

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Sebagai seorang Bumiputera Negeri Sabah, saya dengan penuh hormat dan takzimnya meminta jasa baik pihak Tuan dalam perkara ini.

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[25] Subsequently, the Land Administrator in the person of PW3 conducted an enquiry purportedly under s. 261 of the National Land Code ("NLC") on 12 October 2015 according to exh. D20 produced at the trial. We say purportedly as s. 261 of the NLC is confined to enquiries related to an order for sale. Further, no prior notice of the enquiry appears to have been given to anyone as required under s. 27 of the NLC. The notice of enquiry (at p. 517 RR Bhg C) is also dated 12 October 2015 meaning the enquiry was conducted on the same day as the notice which was highly unusual to say the least. Notably, however, the solicitor for the plaintiffs, Mr Gerard Samuel was present at this enquiry. A representative of the defendants arrived at 2.30pm when they learnt of it.

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[26] The result was that a letter dated 26 October 2015 freezing the order of consent was issued by PW3 on behalf of the Land Administrator. The body of the letter appears as follows (at p. 519 RR Bhg C):

Dengan segala hormatnya perkara diatas adalah dirujuk.

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2. Merujuk kepada siasatan yang telah dijalankan oleh jabatan ini bersama wakil pemohon dan penerima pada 12hb Oktober 2015, pihak kami dimaklumkan bahawa terdapat kes mahkamah sedang dijalankan bagi hartanah ini.

3. Sehubungan dengan itu, kelulusan kebenaran pindahmilik pihak tuan/puan **DIBEKUKAN** sementara sehingga mendapat arahan/perintah selanjutnya daripada Pihak Mahkamah. Dimaklumkan juga bahawa salinan surat kebenaran pindahmilik yang telah dikeluarkan jabatan sebelum ini adalah tidak sah dan tidak boleh digunapakai dalam apa-apa urusan. (emphasis added)

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[27] It is uncertain as to which provision of the law the Land Administrator had exercised his discretion to freeze the order of consent by the State Authority. In any event, as the letter appears to suggest, the order of consent will be effective once the court decides on the dispute between the parties. This was also confirmed by PW3 in his evidence at the trial. He told the court that the plaintiffs' solicitors approached him after the consent dated 4 September 2015. PW3 was told that there was a pending action at the court. PW3 then decided after the enquiry that until the court action is heard and disposed of, the consent should be frozen.

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A [28] PW3 also told the court that he was given a copy of an originating summons (“OS”). That OS, which was tendered in court and marked as exh. D19, was Shah Alam OS No. 24-173-02-2014. This OS was however not pending as it was disposed of by the High Court on 25 November 2014. The present action was only filed on the 25 October 2015. It was plain that there had been some misrepresentation of the facts in the enquiry before the Land Administrator.

[29] Now, having managed to freeze the consent order which they had applied for in the first place in accordance with the agreement as stated in the letter of 6 February 2015, the plaintiffs’ solicitors then issue out a letter dated 28 October 2015. In this letter, they state that the consent dated 4 September 2015 was no longer valid and that the SPA had been lawfully terminated.

D [30] Considering the state of affairs, we have outlined in the foregoing, it is our judgment that notwithstanding who had what obligations under the SPA, this was superseded by the agreement of the parties in the letter of 6 February 2015. As the title to the property contained the restriction in interest in that transfer of title could only be effected with the consent of the State Authority, it was therefore incumbent upon the parties to obtain that consent. In the event the State Authority does not grant the consent, the SPA will become null and void and unenforceable.

F [31] In our view, the learned JC was plainly wrong in making a finding of mutual mistake which issue was not pleaded and not taken by the parties. Whilst the learned JC was right to state that the property could not be transferred to the defendants unless approved by the State Authority, it does not follow that the SPA becomes automatically null and void. It is trite that the restriction in interest was only a limitation and not a prohibition which would render the SPA void. It would be a different matter if the title was endorsed as Malay reserved land in which case such a transfer would be prohibited. In the instant case, there was no such endorsement on the title as confirmed by PW3 and the transfer of title, including from a Bumiputera to a non-Bumiputera, was subject to the consent of the State Authority.

H [32] Having agreed to apply for the consent and having obtained the approval dated 4 September 2015, it was not open to the plaintiffs to then renege on the agreement much less take active steps to thwart the consent order by a misrepresentation of the facts. It was plain to us that the plaintiffs and their solicitor had acted unconscionably and in bad faith. Needless to add, the parties, including the plaintiffs, are bound by what they have agreed in the letter dated 6 February 2015. The learned JC had failed to address her mind on this agreement and the subsequent approval by the State Authority and had therefore misdirected herself in law and fact.

[33] In a case with similar facts, *Yeo Liong Ho v. Loh Choon Hooi* [2010] 2 CLJ 580, this court was faced with the issue of whether the termination of the sale and purchase agreement was valid when there had been a failure to obtain the consent from the State Authority within the time prescribed in the agreement. This court ruled that time had become at large by the vendor's failure to apply and obtain the consent from the State Authority. The vendor could not therefore claim that time was of the essence and issue a notice of termination on that basis. The court then allowed the appeal and ordered specific performance of the agreement. Of particular interest was what was held in relation to the good faith of the vendor as follows (at the headnotes):

(2) The vendor had acted unconscionably and in bad faith in terminating the agreement on 19 September 1992 (on the ground that the balance of the purchase price was not settled on or before 17 September 1992) and in returning the bankers' cheque. The irresistible and inevitable conclusion was that the vendor did not demonstrate good faith and a genuine desire to complete the agreement. Market conditions had become more favourable and the vendor could obtain a higher price for the property. The vendor was always keener to terminate than to conclude the agreement.

[34] In the instant case, there was a mutual agreement to obtain the consent of the State Authority and when that consent was obtained, the plaintiffs went to unusual lengths to get that consent rescinded. In the end, all they achieved was to get the consent frozen until the dispute was resolved by the court. The motivation of the plaintiffs in resorting to this unconscionable conduct was no doubt due to the fact that the market value of the property had gone up. In a "Surat Akuan" dated 30 September 2015 (at p. 558 of RR Bhg C), the first plaintiff had affirmed that the market value of the said property was then RM480,000. Perhaps the plaintiffs did not expect that the State Authority would have granted the consent to transfer and when that happened, the plaintiffs made unfair attempts to frustrate the completion of the SPA. For these reasons, the learned JC was wrong to overlook these facts in arriving at her decision.

[35] Having determined that there could not have been any lawful termination of the SPA, we are in agreement that an order for specific performance of the SPA ought to be granted. There are many case authorities which stand for the proposition that a decree of specific performance will lie against a vendor who refuses to honour an agreement after a condition, such as consent of the authority, has been fulfilled or even where there is a refusal to apply for such consent (see *Chong Hoong & Anor v. Wong Yuen Sang* [1975] 1 LNS 13; [1976] 1 MLJ 282; *Halimah Abdul Rahman v. Fatimah Abdullah* [1976] 1 LNS 38; [1976] 2 MLJ 64; *Chin Tai v. Siow Shiow & Ors* [1970] 1 LNS 15; [1971] 1 MLJ 67 and *Lim Siew Leong & Anor v. Vallipuram* [1973] 1 LNS 80; [1973] 1 MLJ 241).

A [36] As the defendants are ready and willing to continue with the agreement and are able to pay the balance of the purchase price and that the State Authority has given its consent to the transfer, it is only appropriate and fair that an order for specific performance be allowed.

Conclusion

B [37] In the circumstances, and for the reasons we have given, we were persuaded that there are merits in the appeal before us. The appeal is therefore allowed with costs and the order of the High Court is set aside. As a consequence, the counterclaim of the defendants/appellants for specific performance is allowed in terms of prayer 37(a) and (c) of the counterclaim
C subject to payment of the balance of the purchase price without interest within three months from the date of the order (15 November 2017). The respondents are to pay costs of RM40,000 here and below subject to payment on the allocator. Deposit to be refunded.

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